No. 80-151

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITIONERS' REPLY BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioners have received on October 6, 1980 the Respondent's Brief in Opposition to Certiorari. Pursuant to Supreme Court Rule 22, Petitioners file this Reply Brief.

The important thing about Respondent's Brief is that it totally misconceives the duty of the Oklahoma court to follow the rulings of this Court requiring, in a New York Times libel suit, clear and convincing proof, rather than "*any* competent evidence."

Respondent also misconceives and erroneously cites the holdings of this Court as to investigation.

Hence, this short Reply Brief.

QUESTIONS PRESENTED FOR REVIEW

We repeat the questions presented for review as found on page 1 of our original brief but which are not quoted or used by the Respondent.

(a) QUESTIONS PRESENTED FOR REVIEW

1. On appellate review of a libel judgment in favor of a public official, does the First Amendment require that the appellate court review the record and find that the plaintiff public official proved his case by proof of *convincing clarity*? And must the jury have been so instructed?

The Oklahoma Supreme Court held "*any* competent evidence" was sufficient, and that "we do *not weigh* the evidence."

2. In such a case, is the Supreme Court of Oklahoma in constitutional and fundamental error when it holds (a) "We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict'" and (b) "Where there is *any* competent evidence reasonably tending to support the verdict, this Court does not disturb it"?

The Oklahoma court was in fundamental error in not reviewing the record to find proof of *convincing clarity*; and this Court should grant certiorari and reverse, ordering judgment for Petitioners.

INVESTIGATORY FAILURE NOT SUFFICIENT

Respondent's whole case apparently proceeds on the erroneous assumption (as stated on page 13 of its Brief) that "an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers", citing *Curtis v. Butts,* 388 U.S. 130, is sufficient to meet the *New York Times* standard. Respondent relies on the minority opinion which was not followed by the majority of the Court in *Butts.* In *Butts* at page 163 the majority of the Court expressly *rejected* the standard of "extreme departure from standards of investigation" and followed the *New York Times* rule of knowledge of falsity or serious doubts as to truth.

Moreover, in *Butts* at page 153 the Court held "that is to say, such officials were permitted to recover in libel *only* when they could prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. *Investigatory failures alone were held insufficient to satisfy this standard.* See *New York Times,* 376 U.S. at 286-288, 292, and *Garrison v. Louisiana,* 379 U.S. at 73-75, **79".**

Respondent also attempts to rely on *St. Amant v. Thompson* (1968), 390 U.S. 727, although, on page 733, the *St. Amant* court flatly held "failure to investigate does not in itself establish bad faith" (citing *New York Times,* 287-288).

The doctrine was again reaffirmed in *Beckley v. Hanks* (1967), 389 U.S. 81 at 84.

Respondent's thesis is not that the Petitioners knew the story was false or had serious doubts as to its truth, but that the Petitioners did not make a trip to Blair,

Oklahoma, or speak to sufficient witnesses, or make sufficient investigation above that which they did make.

The rule of *Curtis, St. Amant, New York Times,* and *Garrison* applies just as much to Respondent as it did in those cases. Even if the investigation were not as far-reaching or as comprehensive or as minute in detail as the Respondent now suggests (which we vigorously deny), this is not enough. There must be proof of convincing clarity that the Petitioners either knew the publication was false or had serious doubts as to its truth. There was no such proof adduced.

OKLAHOMA COURT FLATLY REJECTED "PROOF OF CONVINCING CLARITY" RULE

As pointed out in our Petition and as now agreed to by Respondent, the Oklahoma court held that instead of having to adduce proof of convincing clarity "*any* competent evidence was all that was required." The Oklahoma court did *not* "*weigh* the evidence."

As stated on pages 4 et seq. of our Petition, the question of proof of convincing clarity was raised throughout the proceedings. The Petition for Rehearing timely filed in the Oklahoma Supreme Court set up that the judgment was bad "because appellees' evidence fails to meet the constitutional standards when measured by the proper constitutional evidentiary test requiring 'convincing clarity'."

This was the burden of the Petition for Rehearing, and the amici briefs stressed this point. The Oklahoma Supreme Court considered this question for two and one-half years. Finally, two and one-half years later, by a 5-to-4 vote, it denied rehearing. It left in the opinion the basic portions of its original opinion (Appendix A to the Petition) and specifically left in effect the following:

"Here, this appeal comes after jury verdict. In *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956), this court's syllabus states:

> 'In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting statements, and where there is *any competent evidence* reasonably tending to support the verdict of the jury, this court will not disturb its verdict and judgment based thereon.'

"The scope of this review is *limited.* We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict'.

"We *do not weigh* the evidence."

Again on page 4:

> "Briefs of the parties in this appeal agree the evidence does not sustain a finding the news item was published with knowledge it was false."

Finally, in the penultimate paragraph of the Opinion, on typed page 6, the Court concluded:

> "Where there is *any* competent evidence reasonably tending to support the verdict, this court does not disturb it."

The Court itself italicized the word "*any*" (the other italics are ours) apparently to make clear its refusal to follow the *clear and convincing* evidence standard. Thus, the Oklahoma Supreme Court gives lip service in a slight degree to the requirement of proof by "clear and convincing evidence" by making reference to that instruction instead of to the many times repeated instruction "preponderance of the evidence." But it still leaves in effect its earlier opinion affirming the trial court decision on the

basis that *any* competent evidence is sufficient, and that it does *not weigh* the evidence.

If there were any question about what the Oklahoma court did, we think it is removed by the following quotation from page 8 of Respondent's Brief in Opposition. We put this in capital letters because of the importance of this statement by Respondent:

> "THE PETITIONERS ASSERT THAT THE WRIT SHOULD BE GRANTED AND THE OKLAHOMA SUPREME COURT REVERSED DUE TO THE STATE SUPREME COURT'S RULING THAT UPON EXAMINING THE RECORDS, THEY FOUND *COMPETENT* EVIDENCE REASONABLY TENDING TO SUPPORT THE VERDICT, AND FURTHER FOUND AND ADVISED THAT THEY *DO NOT WEIGH THE EVIDENCE*. THE STATE COURT CITING *WAT HENRY PONTIAC V. PITCOCK*, OKL., 301 P.2D 203 (1956), STATED THAT IN A LAW ACTION THE *VERDICT OF A JURY IS CONCLUSIVE* AS TO ALL DISPUTED 'COMPETENT EVIDENCE' REASONABLY TENDING TO SUPPORT THE VERDICT OF THE JURY, THE COURT WOULD NOT DISTURB ITS VERDICT AND JUDGMENT BASED THEREON.
>
> "CONTRARY TO THE ASSERTION BY THE PETITIONER THAT THE OKLAHOMA SUPREME COURT REFUSED TO EXAMINE THE RECORD IN THE CASE, IT APPEARS FROM THE OPINION THAT THE RECORD WAS EXAMINED AND COMPETENT EVIDENCE FOUND. THE OPINION FURTHER STATED:

> 'THE SCOPE OF THIS REVIEW IS *LIMITED*. WE NEED ONLY TO DETERMINE IF "THERE IS *ANY COMPETENT EVIDENCE* REASONABLY TENDING TO SUPPORT THE VERDICT".'
>
> "A REVIEW OF THE RECORD IN THE CASE WAS ABSOLUTELY ESSENTIAL FOR THE OKLAHOMA SUPREME COURT TO ARRIVE AT THE ABOVE FINDINGS." (Italics added by us.)

But the review was not under the test of proof of convincing clarity. The Oklahoma court specifically stated "we do not weigh the evidence" and "any competent evidence" is sufficient.

The Supreme Court of Oklahoma opinion has erroneously and flatly ruled on the question of proof of convincing clarity, and this question and *fundamental* error are thus before this Court. See *Beckley,* supra, and the writer's case of *Ocala Star-Banner v. Damron* (1971), 401 U.S. 295 and cases cited in footnote three.

CONCLUSION

The Oklahoma Supreme Court leaves in effect a libel judgment and specifically states that where there is "any competent evidence" this is sufficient. It states "the scope of this review is *limited—we do not weigh* the evidence", and concludes "where there is *any* competent evidence reasonably tending to support the verdict (the Court itself italicizing the word 'any'), this court does not disturb it."

Denial of certiorari here will discourage the four dissenting judges from upholding the First Amendment and encourage the five majority justices to continue on their way.

Respectfully submitted,

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